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IN THE
COURT OF APPEALS OF INDIANA

HEATHER HALE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 39A01-0606-CR-00266
	)	
STATE OF INDIANA,	)	
	)	
Appellee.	)	

APPEAL FROM THE JEFFERSON CIRCUIT COURT
The Honorable Ted R. Todd, Judge
Cause Nos. 39C01-0503-FA-58, 39C01-0504-FB-63, 39C01-0504-FD-65

May 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

SULLIVAN, Judge

Following her guilty plea and convictions for Burglary as a Class C felony,[1] Manufacture of Methamphetamine as a Class B felony,[2] Neglect of a Dependent as a Class D felony,[3] and Violation of a Custody Order as a Class D felony,[4] Appellant-Defendant, Heather Hale, appeals her aggregate sentence of fifteen and one-half years. Upon appeal, Hale argues that the trial court abused its discretion in imposing her sentence by failing to consider certain mitigators and in considering certain invalid aggravators. Hale further claims that her sentence was inappropriate.

We affirm.

According to the factual bases entered during the March 28, 2006 guilty plea hearing, on March 15, 2005, Hale entered a residence owned by another without authorization and was present while certain things were removed. On March 9, 2005, Hale was present and aware of efforts by another to manufacture methamphetamine according to a recipe. Further, at the time of the attempted manufacture, Hale was aware that her child was present. On April 4, 2005, Hale removed her child from the custody of a certain Jeremy Watkins without his consent while fully aware that this was in violation of a custody order.[5]

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[1] Ind. Code § 35-43-2-1 (Burns Code Ed. Repl. 2004).

[2] Ind. Code § 35-48-4-1 (Burns Code Ed. Repl. 2004).

[3] Ind. Code § 35-46-1-4 (Burns Code Ed. Repl. 2004).

[4] Ind. Code § 35-42-3-4 (Burns Code Ed. Repl. 2004).

[5] While the factual basis does not contain a specific admission by Hale that she removed the child outside of Indiana, when asked by the trial court whether she knew of the custody order "at the time that [she] took the child outside of Indiana," Hale answered, "No." Tr. at 46. (She subsequently indicated

On March 28, 2005, Hale was charged under Cause No. 39C01-0503-FA-58 ("FA-58") with burglary as a Class A felony and battery by way of a deadly weapon as a Class C felony. On April 6, 2005, Hale was charged under Cause No. 39C01-0504-FB-63 ("FB-63") with manufacture of methamphetamine as a Class B felony, possession of precursors while in possession of a handgun as a Class C felony, neglect of a dependent as a Class D felony, and maintaining a common nuisance as a Class D felony. On April 6, 2005, Hale was also charged under Cause No. 39C01-0504-FD-65 ("FD-65") with violation of a custody order as a Class D felony. On March 28, 2006, Hale entered into a plea agreement whereby she agreed to plead guilty to burglary as a Class C felony in FA-58, manufacture of methamphetamine as a Class B felony and neglect of a dependent[6] in FB-63, and violation of a custody order as a Class D felony in FD-65. The State in turn agreed to recommend to the court that she receive a four-year cap in FA-58, a ten-year cap in FB-63, and an eighteen-month suspended sentence in FD-65 with the sentences to run consecutively.

On March 28, 2006, in a consolidated plea hearing, the court took the plea agreement under advisement. Following a May 1, 2006 sentencing hearing, the trial court accepted Hale's plea and entered judgment of conviction pursuant to the admitted crimes in the plea agreement. Upon sentencing Hale, the trial court found as the sole mitigating factor the fact that Hale's incarceration would result in hardship for her five-

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that she was aware of the custody order.) In any event, Hale's claims upon appeal only involve her sentence.

[6] Although unspecified in the plea agreement, Hale presumably agreed to plead guilty to neglect of a dependent as a Class D felony as charged.

year-old daughter. The trial court also found four aggravating factors: (1) Hale was out on bond for criminal charges when the instant crimes occurred; (2) reduction below the presumptive would depreciate the seriousness of the manufacturing methamphetamine and neglect of a dependent charges; (3) Hale failed to take responsibility for her actions as demonstrated by her blaming others for her situation; and (4) Hale was delinquent in paying child support. Upon weighing the above factors and considering the plea agreement, the trial court sentenced Hale to four years suspended on the burglary conviction in FA-58; ten years executed for the manufacturing methamphetamine conviction and eighteen months executed for the neglect-of-a-dependent conviction, with those sentences to run concurrently in FB-63;[7] and eighteen months suspended for the violation-of-custody-order conviction in FD-65. The court additionally ordered that the sentences in FA-58, FB-63, and FD-65 were to run consecutively.

Upon appeal, Hale challenges the trial court's sentence by first contesting its consideration and weighing of aggravators and mitigators. We bear in mind that sentencing determinations, including whether to adjust the presumptive sentence,[8] are within the discretion of the trial court. See Ruiz v. State, 818 N.E.2d 927, 928 (Ind. 2004). If a trial court relies upon aggravating or mitigating circumstances, it must do the

[7] Hale makes no argument that the concurrent executed sentences of ten years and eighteen months exceed the agreement that there would be a "ten (l0) year cap in cause number . . . . FB 63." App. 195.

[8] The amended versions of Indiana Code §§ 35-50-2-5, -6, and -7 (Burns Code Ed. Supp. 2006) reference the "advisory" sentence, reflecting the April 25, 2005 changes made to the Indiana sentencing statutes in response to Blakely v. Washington, 542 U.S. 296 (2004). Since Hale committed the crimes in question on March 9, March 15, and April 4, 2005, before the effective date of the amendments, we apply the versions of the statutes then in effect and refer instead to the presumptive sentences. See Ind. Code §§ 35-50-2-5, -6, and -7 (Burns Code Ed. Repl. 2004).

following: (1) identify all significant aggravating or mitigating circumstances; (2) explain why each circumstance is aggravating or mitigating; and (3) articulate the evaluation and balancing of the circumstances. Id.

When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. Stout v. State, 834 N.E.2d 707, 710 (Ind. Ct. App. 2005), trans. denied. The trial court is not required to give the same weight as the defendant does to mitigating evidence. Fugate v. State, 608 N.E.2d 1370, 1374 (Ind. 1993). A single aggravating circumstance may be sufficient to justify an enhanced sentence. McNew v. State, 822 N.E.2d 1078, 1082 (Ind. Ct. App. 2005). An allegation that the trial court failed to identify or find a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Matshazi v. State, 804 N.E.2d 1232, 1239 (Ind. Ct. App. 2004), trans. denied. Further, a trial court is not required to include within the record a statement that it considered all proffered mitigating circumstances, only those that it considered significant. Id.

Upon sentencing Hale, the trial court made the following statement:

> "This is a troubling case, but I do think that there is a mitigator in terms of your hardship and your relationship with your daughter and also probably your mother, and that that's going to create a hardship I realize. However, there are aggravating circumstances too. Certainly, the being out on bond at the time of the offense, the failure to pay child support, although that's a really minor . . . relatively minor one. Certainly, the nature and circumstances of the cases, especially . . . I mean the fact that one did involve an act of violence, although that isn't what you pled guilty to. The fact that a lesser sentence would depreciate the seriousness of the charges

> can also be taken in relation to lowering the . . . or a reason against lowering the presumptive. I do feel that you need some time under supervision, but I also feel that you need . . . you're going to have to be incarcerated for a period of time. So what I'm going to do, I'm going to find you on the Manufacturing of Meth, I'm going to sentence you to ten years[.] [O]n the Neglect of a Dependent, a class D[,] I'm going to sentence you to one-and-a-half years. Both of those are to run concurrently. That is at the same time. On the Burglary, class C, I'm going to sentence you to four years. I am going to suspend the four years and then so that actually you'll end up when you get out of incarceration with the . . . it will be five-and-a-half year probation is what it will amount to. So that . . . although that will run consecutive, but it is a suspended sentence. So with good time it would be five-year sentence. I tell you what I will do. I will write out the aggravators, and then I'll let you prepare the order. Well, you can actually . . . since we're sentencing to the . . . presumptive, I guess we don't have to, do we?" Tr. at 104-06.

In contesting her sentence, Hale argues that the trial court erred by considering only one mitigator and not attributing mitigating weight to three additional mitigators, namely Hale's lack of criminal history, the fact that she pleaded guilty, and her expression of remorse.

With respect to Hale's claim of lack of criminal history, we observe that a trial court must consider all evidence of mitigating factors presented by the defendant, but it is not obligated to agree with the defendant on the weight or value given to each mitigator. Bostick v. State, 804 N.E.2d 218, 225 (Ind. Ct. App. 2004) (citing Bunch v. State, 697 N.E.2d 1255, 1258 (Ind. 1998) (finding trial court was entitled to decline to accord a defendant's lack of criminal history significant weight)). We first observe that Hale was out on bond at the time of the alleged convictions and that she was being sentenced for three causes involving the separate and distinct acts of burglary on March 15, 2005, manufacture of methamphetamine and neglect of a dependent on March 9, and violation

of a custody order on April 4. Nevertheless, it does appear that she had no criminal history to the extent such history is measured by prior convictions. Even if Hale's lack of criminal history were accorded mitigating weight, however, we are not convinced it would be of such mitigating weight as to tip the balance in favor of a sentence less than the presumptive sentence.

With respect to Hale's claim that her guilty plea was entitled to mitigating weight, we observe that a trial court should be inherently aware that a guilty plea is a mitigating factor, but we note that such plea is not necessarily a significant mitigating factor. See Scott v. State, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), trans. denied. Here, although in taking the plea Hale saved the State the resources necessary for trial, the evidence indicating her guilt in the instant cases was sufficiently strong such that her decision to take a plea may have been as much a pragmatic decision as an effort at taking responsibility. Indeed, in FA-58, the victim knew Hale and identified her as the assailant with the baseball bat who had broken into his house in the middle of the night; in FB-63, police executed a search warrant and discovered Hale, with her child, in an apartment containing multiple methamphetamine precursors and a recipe for making methamphetamine; and in Cause No. FD-65, Jeremy Watkins, the father of Hale's child, reported that Hale took the child away from his house in spite of his warnings not to. Further, Hale received a substantial benefit from the plea. (App. 10, 75, 146-48) The burglary charge in Cause No. FA-58 was reduced from a Class A felony to a Class C felony with a four-year sentencing cap, and a second count was dismissed; in Cause No. FB-63, two counts were dismissed and Hale received a capped sentence; and in FD-65,

Hale received an eighteen-month suspended sentence for the Class D felony violation-of-custody-order charge. Given the strength of the reports identifying Hale and alleging her actions and the beneficial nature of the plea, we do not fault the trial court for failing to attribute significant mitigating weight to the fact of her plea.

With respect to Hale's claim that her expression of remorse was improperly overlooked as a significant mitigator, we observe that while a defendant's expression of remorse may be considered as a valid mitigating circumstance, the trial court is in the best position to determine whether a defendant genuinely has remorse. Corralez v. State, 815 N.E.2d 1023, 1025 (Ind. Ct. App. 2004). Here, the record demonstrates that Hale repeatedly indicated during the sentencing hearing that her problems were attributable to her past association with another individual. We decline to second-guess the trial court's evaluation of Hale's remorse or lack thereof.

Hale further challenges the trial court's consideration of aggravators by claiming that two of those aggravators were invalid. The trial court considered as an aggravator that fact that reducing the sentence below the presumptive sentence would depreciate the seriousness of the crime. Hale claims it was error for the trial court to consider this factor because the seriousness of the charges was already factored into the offenses themselves. A trial court's determination that imposition of a reduced sentence would depreciate the seriousness of the crimes for which the defendant is being sentenced is a valid aggravating circumstance properly considered by the trial court. Davidson v. State, 849 N.E.2d 591, 595 (Ind. 2006). Here, the trial court, which was constrained by the plea agreement providing for, at most, the imposition of the presumptive sentence, was

justified in considering the "depreciate the seriousness" factor in determining whether to reduce the presumptive sentence. See id.[9] To the extent the trial court, in according this factor aggravating weight, considered only the elements of the crimes themselves, we conclude that even absent the consideration of this factor, the imposition of the presumptive sentences was within the trial court's discretion.

Hale's second challenge to the court's consideration of aggravators challenges the court's finding that Hale had refused to accept responsibility and continually blamed others.[10] Her argument in this regard, however, is merely that although she was influenced by her husband she nevertheless accepted responsibility for her acts. We deem this to be little more than to request us to assess the evidence as she would like us to do. We will not substitute our discretion for that of the sentencing court.

In sum, we have determined that the trial court did not err in failing to find as significant mitigators Hale's plea and her alleged acceptance of responsibility. In light of the unchallenged aggravators including Hale's failure to support her child and the fact that she was out on bond at the time of the offenses, the mitigators of hardship to her child and, arguably, lack of criminal history do not carry such weight as to require a sentence below the presumptive. We therefore conclude that the trial court was justified in imposing the presumptive sentences for FA-58, FB-63 and FD-65, regardless of whether Hale's refusal to accept responsibility and the "depreciate the seriousness"

[9] We note that our Supreme Court has also endorsed this factor for purposes of determining whether the reduction of an enhanced sentence would depreciate the seriousness of the crime. See Mathews v. State, 849 N.E.2d 578, 589-90 (Ind. 2006).

[10] Failure to accept responsibility is closely akin to failure to show remorse. The two should not be viewed as separate independent aggravators.

factors lent additional aggravating weight. We find no error in the court's imposition, consistent with the plea agreement, of a four-year suspended sentence in FA-58, a ten-year executed sentence and an eighteen-month executed sentence to be served concurrently in FB-63, and an eighteen-month suspended sentence in FD-65.

Regarding Hale's challenge to the appropriateness of her sentence, we note that a defendant may challenge the appropriateness of her sentence in any case where the trial court exercises discretion upon sentencing the defendant. Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006). We may revise a sentence authorized by statute if it is inappropriate in light of the nature of the offense and the character of the offender. Id. (citing Ind. Appellate Rule 7(B)). Here, Hale was convicted of committing burglary, manufacturing methamphetamine, neglect of a dependent child, and violation of a custody order, all of which were committed while she was admittedly out on bond on an October 2004 burglary charge. Hale admitted that the burglary in the instant case involved her breaking into an acquaintance's home and hitting him with a baseball bat, resulting in the acquaintance being hurt fairly severely, all for the purpose of collecting money which the acquaintance allegedly owed her. Hale further admitted that, with respect to the manufacturing methamphetamine and neglect charges, she was scraping matches for use in the meth lab located in the bedroom of her apartment, just a few feet away from where her daughter was sleeping. With respect to the violation of a custody order, Hale admitted taking her daughter, of whom she did not have custody, away from her father, resulting in the issuance of an Amber Alert to find the child. The above facts and circumstances do not suggest to us that Hale's sentence to four years, suspended, on

the burglary charge; ten years executed and eighteen months executed, to be served concurrently, on the manufacturing methamphetamine and neglect charges, respectively; and eighteen months, suspended, on the violation-of-custody charge, is inappropriate in light of Hale's character and the nature of her offenses. Indeed, such sentence was not the maximum permissible under the terms of Hale's plea agreement. We therefore decline Hale's claim that her sentence is inappropriate.

The judgment of the trial court is affirmed.

SHARPNACK, J., and CRONE, J., concur.